KHOO CHENG YEE

v.

KHOO TENG SEONG & NG SENG KIOK & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
LIM BENG CHOON J
[CIVIL SUIT NO. S6-21-115-1990]
12 SEPTEMBER 1992

LAND LAW: *Caveat - Caveatable interest - Beneficiary having a share of the general residue of the estate - Whether she had any interest in any property of the testator until the residual had been ascertained - Section 232(1)(b) National Land Code 1965.*

CIVIL PROCEDURE: *Injunctions - Plaintiff obtained an interim injunction ex-parte based on similar grounds which had been found unfavourable in a previous suit - Plaintiff failed to disclose the material fact - Whether the material non-disclosure ipso facto entitle the defendants to set aside the interim injunction - Appropriate time for Court to determine issue of material non-disclosure - Allegation of fraud and disclosure - Insufficient - It must be sufficiently proved to tilt the balance of probabilities.*

CIVIL PROCEDURE: *Estoppel - Per rem judicatum - Circumstances when a 3rd party was bound by an inter partes judicial decision.*

CIVIL PROCEDURE: *Injunction to grant, scope of - The administration of estate had yet to be completed - Whether the beneficiary had the right to apply for injunction.*

The plaintiff brought this suit as beneficiary and for and on behalf of the estate and trust of the deceased Khoo Boo Gong. The plaintiff's claim was for the rescinding of a sale and purchase agreement for the sale of four parcels of land dated 10 May 1990 ("the first agreement") executed between the 2nd defendant and 3rd defendant and another sale and purchase agreement dated 18 May 1990 ("the second agreement") executed between the 1st defendant and the 2nd defendant. The plaintiff also claimed for damages.

The four parcels of land ("the said land") were property of the estate of Khoo Boo Gong managed by 1st defendant as the sole and surviving executor and trustee of the said estate. By an option agreement dated 20 February 1989, the 1st defendant gave an option to 2nd defendant to purchase the said lands which was duly exercised and subsequently converted to the second agreement. The purchase price was RM3,763,584 calculated on the basis of RM30 per square feet. Prior to execution of the second agreement, the 2nd defendant, pursuant to the option agreement of 20 February 1989, entered into the first agreement with the 3rd defendant to sell the said land to the latter calculated at the rate of RM38 per square feet. The 3rd defendant had since paid the purchase price money in full. A sum of RM3,763,584 was paid directly to the 1st defendant's solicitor and the remaining sum of RM878,259.80 to the 2nd defendant's solicitors as stakeholder.

The plaintiff instituted this suit on 31 May 1990. On 5 June 1990, the plaintiff applied for an interim injunction which was granted *ex-parte* to restrain the three defendants from taking any action in respect of the said land which was subject matter of the 2nd agreement until the trial was over.

The plaintiff had however omitted to mention that the said lands had been caveated in a previous litigation involving the aforementioned two agreements. In the said litigation, the

1st defendant succeeded in removing the two separate caveats lodged by two respondents respectively who were two out of the nineteen beneficiaries of the residuary estate of Khoo Boo Gong (deceased).

At the end of that trial, the Court had directed that the two said caveats had to be set aside on the ground that the two respondents were merely beneficiaries having a share of the general residue of the estate and that they had in law no interest in any property of the testator until the residue had been ascertained. As such the respondents were not entitled under s. 232(1)(b) of the National Land Code 1965 to caveat the said lands. There was also evidence that the plaintiff was fully aware of and had lent full support for the aforesaid originating summons proceedings though not joined as a party.

By three separate applications by the 1st, 2nd and 3rd defendants, they applied for the interim injunction granted *ex-parte* to be set aside.

Held:

[1] In the previous suit, it was held that the two beneficiaries having a share of the general residue of the estate, in law had no interest in any property of the testator until the residual had been ascertained. Therefore they were not entitled under s. 232(1)(b) of the National Land Code 1965 to caveat the said lands. The present suit by the plaintiff who was also another beneficiary was based on identical grounds, which had been already decided in the previous suit.

[2] A judicial decision *inter partes* operates as an estoppel, in favour of and against parties and privies only and not third persons or strangers. However, under a rule of equity peculiar to probate jurisdiction, he is also a party for purposes of estoppel *per rem judicatum* who is cognisant of the proceedings and has the opportunity to intervene and is bound by the result and cannot be allowed to re-open the matter.

[3] The plaintiff was only a beneficiary of the residual estate. As the administration of the said estate had yet to be completed, the plaintiff had no right or title to any specific property that comprised the estate. Therefore the plaintiff had no standing to apply for an interim injunction.

[4] The plaintiff who had obtained the interim injunction *inter alia* by alleging collusion and fraud in the transactions among the 1st, 2nd and 3rd defendants succeeded only in creating mere suspicion that the above transactions might not be above board. To succeed, the plaintiff must at least prove collusion and fraud on a balance of probabilities, which she failed to establish.

[5] The 1st defendant sold the said lands after having obtained professional valuation of the said lands and having advertised the sale of the lands in two local newspapers which did not attract any buyers. The 2nd defendant in turn sold the land at RM38 per sq. ft. to the 3rd defendant thereby making a profit of RM8 per sq. ft. As the transactions were normal commercial undertaking and they were *bona fide* purchasers, there cannot be any allegation of fraud or collusion as claimed by the beneficiary.

[6] The plaintiff in applying for the interim injunction did not disclose the fact that two of the beneficiaries of the residual estate had earlier caveated the said land. This material non-disclosure *ipso facto* entitled the defendants to have the interim injunction set aside.

[7] The plaintiff's contention that the appropriate time for the Court to determine an application for the ground of material non-disclosure was at the trial rather than during the interlocutory stage of the proceeding was struck down.

[8] On a balance of convenience, damages would not be an adequate remedy for the 3rd defendant. The injunction restraining them from completing the transfer of the said land would cause the 3rd defendant to suffer loss of commercial opportunities and this was definitely immeasurable since the timing of a commercial decision was crucial in determining its success. The 3rd defendant was also deprived of the use and enjoyment of the said land purchased by them and also prevented from selecting a bank or financial institution which could give them credit and loan facilities which would be to their advantage.

[9] Should the plaintiff fail in her claims against all the defendants or even against the 2nd and 3rd defendants, she had more than one set of damages to pay. For these reasons it was clear that the balance of convenience lie in favour of the defendants.

[Injunction set aside. Costs of proceeding to be paid by plaintiff; SAR to assess damages.]

Cases referred to:
Khoo Teng Seong v. Khoo Teng Peng [1990] 2 CLJ (Rep) 242 ***(foll)***
Gray v. Lewis [1873] 8 Ch App 1035 ***(foll)***
In the estate of Langton [1964] 163 CA ***(foll)***
Yap Ban Ler v. Yap Ah Looi [1988] 2 CLJ (Rep) 560 ***(foll)***
Nayar v. Ponnusamy [1982] 2 MLJ 174 ***(foll)***
Dormenil Freres SA & Anor. v. Nicolian International (Textiles) Ltd. [1988] 3 All ER 197 ***(dist)***
Ali and Faud Shobokshi Group Ltd. v. Moneim [1989] 1 WLR 710 ***(foll)***
American Cyanamid Co. v. Ethicon Ltd. [1975] AC 396 ***(foll)***

Legislation referred to:
National Land Code 1965 s. 232(1)(b)

For the plaintiff - Cecil Ibrahim (Chan Kah Nong with him); M/s. Khaw & Hussein
For the 1st defendant - Wong Soon Toh; M/s. Chooi & Co.
For the 2nd defendant - Patrick Low (Lim Ts-Fei with him); M/s. Chye, Chow, Chung & Co.
For the 3rd defendant - C.U. Das (Millie Chan & W.L. Chong with him); M/s. W.Y. Chan & Roy

JUDGMENT

Lim Beng Choon J:

In the present case there are three applications made by way of summons-in-chambers dated 13 July 1990, 25 July 1990 and 25 October 1990 made by the 1st, 2nd and 3rd defendants respectively to set aside an interim injunction granted *ex-parte* by Abdul Razak J on 8 June 1990 to the plaintiff to restrain the three defendants and/or their servants or agents from taking any steps or further steps or doing anything further in the matter of lands held under title Nos. CT 16135 Lot 57, CT 20982 Lot 717, CT 16118 Lot 40 and GM 1423 Lot 789 all under s. 88A in the Town and District of Kuala Lumpur (the said 4 parcels of land) which are subject matters of two sale and purchase agreements dated 10 May 1989 and 18 May 1989 respectively until the trial of this action or until further order.

Before I deal with the three applications to set aside the aforementioned interim injunction it is necessary for me to state very briefly the claims of the plaintiff in this civil suit instituted by her on 31 May 1990. On 5 June plaintiff applied by way of a summons-in-chambers for an interim injunction which was granted *ex-parte* to restrain the three defendants from doing the things which I have mentioned earlier. From the indorsement of claim in her writ, it can be seen that the plaintiff claims to sue as beneficiary and for and on behalf of the estate and trust of Khoo Boo Gong. The first named 1st defendant is sued as the executor and trustee of the said estate and trust. The second named 1st defendant is sued as the purported

attorney of the first named 1st defendant and as executor *de son tort* of the said estate and trust. The 4th defendant is sued as a nominal defendant for purposes of enforcing certain orders prayed for. The plaintiff's claim is for the rescinding of a sale & purchase agreement dated 10 May 1990 (the 10 May S & P Agreement) executed between the 2nd defendant and 3rd defendant and another sale and purchase agreement dated 18 May 1990 (the 18 May S & P Agreement) executed between the 1st defendant and the 2nd defendant. The plaintiff is also claiming for damages.

From the pleadings and the various affidavits filed by the respective parties to this suit, the following facts cannot be disputed. At all material times the 4 parcels of land were property of the estate of Khoo Boo Gong managed by the first named 1st defendant as the sole and surviving executor and trustee of the said estate. By an option agreement dated 20 February 1989 the first named 1st defendant gave an option to the 2nd defendant to purchase the 4 parcels of land which option was duly exercised and subsequently converted to the 18 May S & P agreement. This agreement was signed by the second named 1st defendant in his representative capacity for and on behalf of the first named 1st defendant who at all material times was a permanent resident in Australia (see Exh. "KCY2" annexed to the affidavit of the plaintiff affirmed on 31 May 1990). The plaintiff too is a permanent resident in Australia and she affirmed the said affidavit before a notary public in Australia. The purchase price was in the sum of RM3,763,584 calculated on the basis of RM30 per sq. ft.

Prior to the execution of the 18 May S & P agreement, the 2nd defendant, pursuant to the option agreement of 20 February 1989, entered into 10 May S & P agreement with the 3rd defendant to sell the four parcels of land to the latter for the total purchase price of RM4,767,206.40 calculated at the rate of RM38 per sq. ft. The 3rd defendant had since paid the purchase price money in full. A sum of RM3,763,584 was paid directly to the 1st defendant's solicitors and the remaining sum of RM878,259.80 to the 2nd defendant's solicitors as stakeholder.

It is important to mention that the 4 parcels of land have been the subject of previous litigation involving the aforementioned two S & P agreements. In the said litigation the first named 1st defendant here in his capacity as the sole surviving executor and trustee of the Estate of Khoo Boo Gong moved this Court by two Originating Motions No. 25-69-89 and Originating Motion No. 25-89-89 to remove the two separate caveats lodged by Khoo Teng Ping and Khoo Teng Bin respectively against the 4 parcels of land. The two respondents there were two out of 19 beneficiaries who were allotted certain number of shares each of the residuary estate pursuant to the last will of Khoo Boo Gong (deceased) dated 31 December 1974 (see Exh. 'KCY1' annexed to the affidavit of the plaintiff affirmed on 31 May 1990). The grounds relied upon by the affidavit in the two aforementioned originating motions to remove the said caveats were that:

(a) the respondents had no interest in the said lands;

(b) the respondents did not have any right to claim title to or any interest in the said lands; and

(c) the said caveats were wrongfully presented by the respondents.

On the other hand both the respondents relied on the following grounds to sustain their rights to present the caveats:

(i) they were beneficiaries of the estate of the deceased;

(ii) they had a share in the proceeds of the sale of the said lands;

(iii) the applicant failed to administer the estate in accordance with the will of the deceased; and

(iv) the purchase price calculated on the basis of RM30 per sq. ft. was below the open market value and hence it was unreasonable to sell the said lands based on such calculation.

The two motions were heard together as they involved the same facts and principles of law. At the end of the trial I found for the applicant and directed that the two said caveats had to be set aside. I arrived at the conclusion basically on the ground that as the two respondents were merely beneficiaries having a share of the general residue of the estate, they had in law no interest in any property of the testator until the residual had been ascertained and that in the meantime their rights were only confined to having the estate properly administered. As the administration of the estate had not yet been completed and the residue had not yet been ascertained, the respondents therefore were not entitled under s. 232(1)(b) of the National Land Code 1965 to caveat the said lands (see *Khoo Teng Seong v. Khoo Teng Peng* [1990] 2 CLJ (Rep) 242).

In the present civil suit instituted by the plaintiff, she too is suing the defendants in her capacity as one of the beneficiaries under the last will of Khoo Boo Gong (deceased) and a beneficiary under one of the trusts created under the said will out of the residuary estate of the testator. Basically the plaintiff's complaint rests on her allegation that the sale of the 4 parcels of land at the purchase price specified in the 18 May S & P agreement was grossly inadequate. The two respondents in the aforementioned originating motions proceedings raised exactly the same complaint and they produced two valuation reports to sustain their claims. In her application for an interim injunction, the plaintiff too used the same two valuation reports to sustain her allegation.

The plaintiff has not even suggested let alone asserted that the administration of the estate of Khoo Boo Gong has since been completed. More importantly the plaintiff prior to the instituting of the present suit was fully aware of the aforesaid originating motions proceedings and the caveats lodged by the two respondents thereof. Indeed she lent her full support in the steps taken by the two respondents in lodging the said caveats and their action to remove the 1st defendant as executor and trustee of the said estate (see the letter dated 7 August 1989 written by Khoo Teng Peng to the solicitors of the applicant in the said originating motion complaining about the then purchase price accepted by the applicant in the sale of the 4 parcels of land under 18 May S & P agreement and breach of fiduciary duty on the part of the applicant. This letter was annexed as Exh. KTS5 to the affidavit of Khoo Teng Seong affirmed on 2 July 1990. The plaintiff's unconditional agreement with the steps taken by the said respondent Khoo Teng Bin was expressed in her letter dated 8 November 1989 annexed as Exh. "KTP8" to the further affidavit of Khoo Teng Seong affirmed on 27 November 1989). Another important point to be noted is that although the plaintiff was fully aware of the steps taken by the two respondents in the aforementioned originating motion proceedings she chose not to join them in the proceedings; neither did she herself caveat the 4 parcels of land. Instead she instituted the present suit based on almost identical grounds two weeks after the caveats lodged by the two respondents were removed and proceeded to apply and obtain an *ex-parte* interim injunction which in effect achieves the same result as the earlier caveats namely to prevent the 1st defendant from transferring the 4 parcels of land to the 2nd defendant.

Now it has been held that although a judicial decision *inter partes* operates as an estoppel, in favour of and against, parties and privies only and not third persons or strangers (see for instance *Gray v Lewis* [1873] 8 Ch App 1035) nevertheless there is a further rule of equity peculiar to probate jurisdiction that he is also a "party" for purposes of estoppel *per rem judicatam* who, being cognisant of proceedings and of the fact that a party thereto in professing to act in his interest, allows the battle to be fought by that party intending to take the benefit of his championship in the event of success. Thus in the *Estate of Langton* [1964] p. 163 CA William LJ observed at p. 169:

> The principle relied on is that an interested person who is cognisant of the proceedings and has the opportunity to intervene is bound by the result and cannot be allowed to re-open the matter.

So too said Dankwerts LJ at p. 175 and Diplock LJ at p. 178 of the same case. Counsel for the 3rd defendant cited the case of *Nana Ofori Atta v. Nana Abu Bousra* where Lord Denning in the Privy Council went even further to propose that the aforesaid principle was not necessarily limited to wills and representative actions; it could be applied to "conditions which were found appropriate for it there."

The aforesaid principle is particularly applicable to the present suit of the plaintiff where there are 19 beneficiaries of the residual estate who could, if the plaintiffs action is allowed to proceed, litigate similar claim piece-meal. The plaintiff has no answer whatsoever with regard to this aspect of the law.

For the above reason alone the interim injunction obtained *ex-parte* must be set aside.

Even should I be found wrong in applying the aforementioned principle to the present case (to which I must say that I do not think such an event could happen) nonetheless I would still hold that the said interim injunction must be set aside as the plaintiff under the circumstances of this case has no standing to apply for the interim injunction. I rely on my judgment in the *Khoo Teng Seong v. Khoo Teng Peng's* case (*supra*) where I held that it is trite law that the respondents there as beneficiaries of the residual estate when the administration of the said estate had yet to be completed had no right or title to any specific property that comprised the estate to support my present decision.

The second matter which I should take into consideration is that since the plaintiff obtained the interim injunction by *inter alia* alleging collusion and fraud against the 2nd and 3rd defendants, it is not sufficient that she particularised the purported collusion and fraud committed by the two defendants. She must also be able to prove the two elements if not beyond reasonable doubt at least to the extent of more than sufficient to tilt the balance of probabilities in her favour. From the affidavit evidence adduced all the plaintiff has succeeded in doing is to create suspicions that the transactions of the 2nd and 3rd defendants *vis-a-vis* the 1st defendant might not be above board. For instance she alleged that before the 1st defendant could execute the 18 May S & P agreement the 2nd defendant had already sold the 4 parcels of land to the 3rd defendant some 8 days earlier. Such an allegation is to mind a frivolous and vexatious allegation which is not worthy of considering. In making this allegation she conveniently overlooked that the 1st defendant had on 20 February 1989 given an option to the 2nd defendant to purchase the 4 parcels of land at the agreed purchase price calculable on the basis of RM30 per sq. ft. It was based on this option which would expire only on or about August 1989 that the 2nd and 3rd defendants entered into the 10 May S & P agreement since the 2nd defendant had on 12 April 1989 expressly required the 1st defendant to proceed with the execution of a sale and purchase agreement as stipulated

in the option agreement of 20 February 1989. Another frivolous and vexatious allegation made by the plaintiff is that as the 2nd defendant stood to gain RM8 more per sq. ft. when they sold the 4 parcels of land to the 3rd defendant, this shows that the consideration for the sale by the 1st defendant to the 2nd defendant was depreciatory and inadequate. But can this allegation be sufficient to establish collusion and fraud on the part of the 3rd defendant?.

Indeed can this allegation be sufficient even to prove collusion and fraud on the part of the 2nd defendant? I would say no simply because as the 1st defendant had agreed to sell the 4 parcels of land to the 2nd defendant at a purchase price based on a valuation report furnished to him by an authorised and registered valuer and furthermore the 1st defendant had placed two advertisements in two different local newspapers on 1 November 1988 and 7 November 1988 offering to sell the 4 parcels of land at RM30 per sq. ft. but still failed to attract any potential purchasers, the 1st defendant had to my mind taken reasonable steps to satisfy himself that the prevailing open market price could not exceed RM30 per sq. ft. Under the circumstances it is highly credible that the 1st defendant having satisfied himself as to the appropriate open market price voluntarily agreed to sell the 4 parcels of land to the 2nd defendant.

The fact that the 3rd defendant chose to buy the same at a higher price is not so an uncommon business transaction that one can impute collusion and fraud on the part of the 2nd defendant. That being the case there is no doubt that the 2nd and 3rd defendant are both *bona fide* purchasers and their purchases could not be affected by any claims or complaints that the beneficiaries might have against the sale. If at all they have a remedy, it is against the 1st defendant - see *Yap Ban Ler v. Yap Ah Looi* [1988] 2 CLJ (Rep) 560.

The third matter that should be considered is non-disclosure of material facts by the plaintiff at the time when she applied for and obtained the *ex-parte* interim injunction. There is no dispute that the plaintiff in applying for the interim injunction did not disclose the fact that two of the beneficiaries of the residual estate had earlier caveated the 4 parcels of land and that the 1st defendant had successfully applied in the aforementioned originating motion proceedings to set aside the said caveats although as stated earlier the plaintiff was fully aware of the caveating of the 4 parcels of land by the said two beneficiaries and the result of the originating motion proceedings.

To my mind the non-disclosure is significant in that had the aforesaid matters been disclosed to Abdul Razak J who granted the interim injunction, it would be more probable than not that the learned Judge would have directed his mind to the questions of *res judicata, estoppel per rem judicatam* and the standing of the plaintiff to sue. It was only when the three defendants' applications to set aside the interim injunction was made that the aforesaid matters were raised by the three defendants. In fact when the applications of the three defendants came on for hearing on 29 October 1990 and after hearing arguments of the respective Counsel Abdul Razak J adjourned the hearing to a date to be fixed and informed Counsel that he would get in touch with me to see whether I was prepared to hear the applications. That was how the said applications came to me for hearing. This clearly shows it was only at the hearing of the three defendants' applications to remove the interim injunction where the aforesaid matters relating to the earlier caveating of the 4 parcels of land and the subsequent removal of the same came to the notice of Abdul Razak J. Bearing in mind that a major part of the allegations made in her statement of claim are almost identical with the allegations of the two respondents in opposing the originating motions proceedings, the material non-disclosure must *ipso facto* entitle the defendants to have the interim injunction set aside - see *Nayar v. Ponnusamy* [1982] 2 MLJ 174.

Counsel for the plaintiff, however, relies on the case of *Dormenil Freres SA & Anor. v. Nicolian International (Textiles) Ltd.* [1988] 3 All ER 197 to support his contention that the appropriate time for the Court to determine an application for the setting aside of an interim injunction on the ground of material non-disclosure is at the trial rather than during the interlocutory stage of the proceeding. With due respect I do not think the *Dormenil's* case is of any assistance to the plaintiff because in that case the application was made *inter alia* to set aside an Anton Piller and the reason for the learned Judge in making the observation relied by Counsel for the plaintiff is whether the non-disclosure was material or otherwise depended on the veracity of the deponent of an affidavit in asserting the materials which were relevant to the issue of non-disclosure (see p. 200 g-h). In any event the said observation made in the *Dormenil's* case was not followed in the subsequent case of *Ali and Faud Shobokshi Group Ltd. v. Moneim* [1989] 1 WLR 710 where Mervyn Davies J was of the view that the observation made in the *Dormenil's* case was inconsistent with the approach adopted in the majority of cases decided by the English Courts.

I now turn to the final issue relating to the question of damage. The cardinal principle that has been laid down in the *American Cyanamid Co. v. Ethicon Ltd.* [1975] AC 396 is that in considering the balance of convenience whether to grant or to refuse the interlocutory injunction, the governing principle is whether the plaintiff would be adequately compensated by an award of damages which the defendant would be in a financial position to pay and if not the interim injunction should normally **not** be granted, but if the answer is yes, the Court should then consider whether the defendant would be adequately compensated by the plaintiff's undertaking as to damages which the plaintiff will be in a financial position to pay, and if so, the interim injunction should normally **not** be granted.

In the present case even assuming and without deciding that the plaintiff would not be sufficiently compensated by an award of damages, I still have to consider whether the defendant would be adequately compensated by the plaintiff's undertaking as to damages. In considering this matter I agree with the submission of Counsel for the 3rd defendant where he said that damages would certainly not be an adequate remedy for the 3rd defendant. The 4 parcels of land were bought at a substantial price and the 3rd defendant bought them for the purpose of building development. The injunction restraining them from completing the transfer of the said lands to them inevitably would greatly affect their plan to develop the said lands. Each day that passes by would cause the 3rd defendant to suffer loss of commercial opportunities and this is definitely immeasurable since the timing of a commercial decision is crucial in determining its success: when to buy, when to develop and when to offer for sale. Another factor that has to be taken into consideration is that as the 3rd defendant is deprived of the use and enjoyment of the 4 parcels of land purchased by them, they have also been prevented from selecting a bank or financial institution which could give them credit and loan facilities which would be to the 3rd defendant's advantage. Finally should the plaintiff fail in her claims against all the defendants or even against the 2nd and 3rd defendants she has more than one set of damages to pay. For these reasons it is clear that the balance of convenience lies in favour of the defendants.

For the above reasons the interim injunction granted to the plaintiff on 8 June 1990 is set aside. Pursuant to the undertaking of the plaintiffs to pay damages, I direct that the SAR should assess the damages due to each of the 3 defendants. Costs of the proceedings are to be paid by the plaintiff.

Also found at [1992] 4 CLJ 2140